UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RONALD MELTON, et al.,	)	**Case No. C-1-01-528**
	:	
Plaintiffs,	)	**(Judge Spiegel)**
	:	
-v-	)	
	:	
BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO, et al.,	)	
	:	
	)	
	:	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL, MOTION FOR CONTINUANCE OF TRIAL DATE, MOTION FOR EXTENSION OF TIME TO FILE PRETRIAL STATEMENT, AND MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

In response to Plaintiffs' Motion for Voluntary Dismissal (Doc. 101), Motion for Continuance of Trial Date (Doc. 104), Motion for Extension of Time to File Pretrial Statement (Doc. 103), and Motion for Extension of Time to File Memorandum in Opposition to Defendants' Motions for Summary Judgment (Doc. 102), Defendants, Hamilton County, Ohio, Tom Neyer, Jr., John S. Dowlin and Todd Portune, individually and on behalf of Hamilton County, Ohio in their capacity as official representatives of the County, and Robert Pfalzgraf, M.D. ("Defendants"), state as follows:

I. INTRODUCTION

Plaintiffs' present motion to dismiss is nothing more than a desperate attempt to avoid summary disposition of their case and, if ultimately necessary, a trial on the merits. Plaintiffs clearly are trying to accomplish what they were not permitted to accomplish by way of their eleventh-hour motion to consolidate. Their goal, of course, is to get out of this case any way they can, regardless of whether it will prejudice Defendants. This Court should not countenance such an inappropriate use of the Civil Rules.

II. ARGUMENT

A. Plaintiffs Should Not Be Permitted To Dismiss This Case Without Prejudice At This Late Stage Of The Litigation.

The decision whether to grant a request for voluntary dismissal under Civil Rule 41(a)(2) is within the sound discretion of the trial court. *See Grover by Grover v. Eli Lilly and Co.*, 33 F.3d 716, 718 (6th Cir. 1994). The purpose of requiring the trial court to approve such a dismissal is to protect the non-movant from unfair treatment. *Id.* An abuse of discretion is found where the defendant would suffer "plain legal prejudice" as a result of the dismissal of the case without prejudice. *Id.* In *Grover*, the Sixth Circuit identified four factors which a trial court should consider when determining whether to grant a voluntary dismissal: (1) the amount of time and effort the defendant has incurred in preparing for trial; (2) any lack of diligence on the part of the plaintiff in prosecuting the action; (3) the plaintiff's failure to explain the need for a dismissal; and (4) whether the defendant has filed a motion for summary judgment. *Id.*

In the instant case, Defendants have devoted much time and expense to defending this case. Indeed, Plaintiffs' action has been actively pending in this Court for a significant length of time – *nearly three years*. As this Court is well aware, Defendants attempted to avoid incurring these needless expenses by moving to have this case consolidated with the class action styled *Jacqueline Chesher v. Tom Neyer, Jr., et al.*, Case No. C-1-01-566. In their motion to consolidate, Defendants argued that because the cases involved many common issues of law and fact, the cases should be consolidated, at least for purposes of discovery. This, of course, would have avoided the need to take the same depositions in both cases. Plaintiffs, however, refused to accept consolidation of the cases and, instead, insisted that they be permitted to litigate their own case, even if it meant that much of the discovery would have to be duplicated. This Court ruled in favor of Plaintiffs and allowed them to prosecute the instant case to its current posture. Per the Court's instruction, Defendants proceeded with their discovery in this case, filed motions for summary judgment, and now are preparing for a trial scheduled for July 6, 2004. It should be noted that Defendants also incurred significant expense in drafting and filing motions to dismiss, a motion to compel discovery from Plaintiffs and, of course, their motion to consolidate the cases for the express purpose of saving the taxpayers' dollars.

Under these circumstances, this Court must deny Plaintiffs' motion to dismiss. For example, in *Ali v. St. John Hospital*, 836 F.2d 549, 1987 WL 30582 (6th Cir. 1987), the Sixth Circuit held that the trial court abused its discretion when it granted voluntary dismissal of the case without prejudice. The *Ali* Court stated:

> The record reveals a combination of factors which strongly militate against granting the motion. Ali's action had been actively pending in the federal court for a significant length of time, nearly two years. Discovery was virtually complete. Moreover, the hospital had expended substantial time and expense in defending the case, notably, its removal of the case to federal court, discovery, mediation meetings under the local district court rules, and its filing of a motion to dismiss and summary judgment. ***Under these circumstances, denial of a motion for voluntary dismissal without prejudice is the norm***.

Id. at *1 (emphasis added) (citing cases). By the same token, under the circumstances of this case, Plaintiffs' motion should be denied.

It also should be noted that Plaintiffs' motion to dismiss, much like its eleventh-hour motion to consolidate the case with the *Chesher* action, is nothing more than a desperate attempt to save an otherwise floundering case. Indeed, despite having had nearly three years to conduct their discovery, Plaintiffs have done close to nothing to prepare themselves for trial. As this Court has recognized, Defendants, on the other hand, have "dutifully cooperated in discovery" and "need not wait any longer for a trial of this matter." (Doc. 99, at 4).

With respect to the final two factors this Court must consider, there can be no question that they weigh heavily in the favor of Defendants. In support of their motion to voluntarily dismiss, Plaintiffs filed a one-half page memorandum in which they provide absolutely no explanation as to why the dismissal is needed. Moreover, each of the Defendants in this case has filed a motion for summary judgment. Plaintiffs, however, never have responded to these motions. Instead, Plaintiffs filed their motion to consolidate and, when that motion failed to save them from having to respond to the Defendants' motions, Plaintiffs filed the instant motion to dismiss. This Court should not countenance Plaintiffs' last-minute attempt to avoid summary judgment or, if necessary, trial on the merits.

B. In The Alternative, Plaintiffs Should Be Required To Compensate Defendants For The Expenses Incurred In Defending This Action.

In the Sixth Circuit, a trial court may award attorney fees against the dismissing party when the dismissal is without prejudice for the purpose of "compensate[ing] the defendant for expenses in preparing for trial in light of the fact that a new action may be brought in another forum." *See Johnson v. Pharmacia & Upjohn Co.*, 192 F.R.D. 226, 229 (S.D. Mich. 1999) (*citing Smoot v. Fox*, 353 F.2d 830, 833 (6th Cir. 1965)). Indeed, a "review of relevant authority suggests that generally, Rule 41(a)(2) dismissals are conditioned upon payment of at least a portion of the defendant's expenses related to defending the suit." *Kienitz v. Metropolitan Life Ins. Co.*, 131 F.R.D. 106 (S.D. Mich. 1990); *see also Gliatta v. Tectum, Inc.*, 211 F.Supp.2d 992, 1012 (S.D. Ohio 2002) (conditioning dismissal on basis that the plaintiff will be liable for any costs and fees incurred by the defendants in having to defend the case a second time). Should this Court determine that a dismissal without prejudice is appropriate at this stage of the litigation, Defendants should be awarded some or all of the costs and expenses they incurred in defending this suit. Such an award clearly is appropriate in light of the fact that Plaintiffs in this case vehemently opposed Defendants' previous efforts to minimize their expenses by consolidating the case with the *Chesher* action. Plaintiffs should be held accountable for the duplicative expenses incurred by Defendants in this case.

III. CONCLUSION

For all of the foregoing reasons, Plaintiffs' various motions to dismiss and/or to postpone the litigation should be denied. In the alternative, Defendants should be awarded some or all of the costs and expenses they incurred in defending this lawsuit.

Respectfully submitted,

/s/ Louis F. Gilligan
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon David W. Kapor, 36 East Seventh Street, Suite 1520, Cincinnati, Ohio 45202; Michael B. Ganson, 36 East Seventh Street, Suite 1540, Cincinnati, Ohio 45202; Stephen J. Patsfall, Patsfall Yeager & Pflum LLC, Suite 2100, One West Fourth Street, Cincinnati, Ohio 45202; Larry E. Barbiere, Schroeder, Maundrell, Barbiere & Powers, 11935 Mason Road, Suite 100, Cincinnati, Ohio 45249; and Glenn V. Whitaker and Victor A. Walton, Vorys, Sater, Seymour and Pease, LLP, Atrium Two, 221 East Fourth Street, Cincinnati, Ohio 45202, by ordinary U.S. mail, this ___ day of May, 2004.

/s/ Louis F. Gilligan
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